IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 14422 of 2005
With
SPECIAL CIVIL APPLICATION No. 14424 of 2005
With
SPECIAL CIVIL APPLICATION No. 15033 of 2005
To
SPECIAL CIVIL APPLICATION No. 15051 of 2005
With
SPECIAL CIVIL APPLICATION No. 15068 of 2005
With
SPECIAL CIVIL APPLICATION No. 15070 of 2005
With
CIVIL APPLICATION No. 6880 of 2005
In
SPECIAL CIVIL APPLICATION No. 14422 of 2005
With
CIVIL APPLICATION No. 6881 of 2005
In
SPECIAL CIVIL APPLICATION No. 14424 of 2005
With
CIVIL APPLICATION No. 10247 of 2005
In
SPECIAL CIVIL APPLICATION No. 14422 of 2005
With
CIVIL APPLICATION No. 10249 of 2005
In
SPECIAL CIVIL APPLICATION No. 14424 of 2005
With
CIVIL APPLICATION No. 10250 of 2005
In
SPECIAL CIVIL APPLICATION No. 15068 of 2005
With
CIVIL APPLICATION No. 10252 of 2005
In
SPECIAL CIVIL APPLICATION No. 15070 of 2005

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ESSAR STEEL LIMITED & 1 - Petitioner(s)
Versus
STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :
MR KS NANAVATI and MR MIHIR H. JOSHI, Sr. ADVOCATES with MR KEYUR GANDHI, FOR NANAVATI ASSOCIATES for Petitioner(s) : 1 - 2.
MR KAMAL B TRIVEDI, ADVOCATE GENERAL with MS. SANGITA VISHEN, AGP for Respondent(s) : 1-3.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 28/03/2006
ORAL ORDER

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

All these petitions are filed by the same public limited Company - Essar Steel Ltd. and its Director for challenging the assessment orders and revisional orders passed by the authorities under the Gujarat Sales-tax Act, 1969 (hereinafter referred to as “the Act”) in so far as the authorities have taken the view that the petitioner-Company had illegally availed of the benefits of exemption under the Pioneer Unit Status Incentive Scheme and the Prestigious Unit Status Incentive Scheme.

2. The petitions were initially filed against show cause notices issued by the authorities -

(i) calling upon the petitioner-Company to show cause why the assessment orders passed in favour of the petitioner – Company for the years 1995-96, 1996-97, 1997-98 and 2000-01 should not be revised by the Commissioner of Sales-tax in suo motu revision under Section 67 of the Act,

(ii) calling upon the petitioner- Company to show cause why the assessment orders passed by the Assessing Officer in favour of the petitioner-Company for the years 1998-99 and 1999-2000 should not be taken up under Section 50 of the Act for withdrawing the benefits of exemption availed of by the petitioner -Company for the relevant years.

(iii) calling upon the petitioner- Company to show cause why the petitioner- Company should not be denied the benefit of exemption for the years 2001-02 to 2004-05.

This Court (Coram: Hon'ble Mr Justice RS Garg & Hon'ble Mr Justice KM Mehta) entertained the petitions by issuing notice and granted ad-interim protection, subject to the condition that the petitioner- company deposits Rs.75 crores. The petitioner- Company complied with the said condition, but during pendency of the petitions, the Commissioner of Sales-tax passed orders dated 22.7.2005 against the petitioner -Company for the years 1995-96, 1996-97, 1997-98 and 2000-01 and also imposed the penalty of one and half times the amount of tax levied. Similarly the Deputy Commissioner of Sales-tax (Corporate Cell) passed orders dated 16.7.2005 under Section 50 of the Act holding that the petitioner- Company had illegally availed the benefits of tax exemption under the incentive schemes

and imposed the penalty of one and half times the tax levied. The petitioners accordingly amended the petitions for challenging the said orders.

The following order was passed on 6.10.2005 :-

> "So far as filing of the appeals are concerned, the petitioners are free to file the appeals before the appropriate forum and they would also be free to file necessary applications for extension of time and seeking exemption or partial exemption from the deposit before this Court. Put up on 18th October, 2005 for further consideration.
>
> Sd/-
>
> [R.S. Garg, J.}
>
> Sd/-
>
> [K.M. Mehta, J.]"

Without prejudice to their rights and contentions in the petitions, the petitioner- Company filed appeals against the orders of the Dy. Commissioner of Sales-tax and revisions against the orders of the Sales-tax Commissioner in order to save limitation.

3. The facts leading to filing of this group of petitions are as under:-

3.1 The Government of Gujarat declared a Composite Sales-tax Incentive Scheme, 1987 for pioneer units. Under the Scheme, an eligible unit was entitled to purchase free of tax raw materials, processing materials, consumable stores etc. for the

purpose of use in the manufacture of goods, and the goods manufactured were allowed to enjoy the benefits by way of sales-tax exemption or deferment under Entry 118 under Section 49(2) of the Act, subject to ceilings described in the annexure depending on the investments made by the pioneer unit.

3.2 As per the eligibility certificate granted on 16.7.1991 and amended on 26.12.2000, the petitioner- Company was granted exemption limit of Rs.237.59 crores for the period from 1.8.1990 to 31.7.2004. The Company commenced commercial production of its pioneer unit (Unit No.1) manufacturing Hot Briquetted Iron (HBI) from 1.8.1990.

3.3 The petitioner- Company also set up another unit i.e. Unit No.2 at the Company's Hazira plant for commercial production of Hot Rolled Coils (HRC) wherein HBI was an intermediate product. For manufacturing HRC in unit No.2, the petitioner used HBI manufactured in unit No.1 as well as in unit No.2. Under the Scheme for Special Incentives to Prestigious Units issued by the State Government on 26.7.1991, the petitioner – Company was also granted eligibility certificate dated 15.12.1993 (which was subsequently amended) for availing of exemption under Entry 255 of the Scheme for Prestigious Units in respect of unit No.2 for the period from 22.2.1993 to 21.2.2007 for an amount of Rs.2050 crores.

3.4 The commercial production of unit No.2 manufacturing HRC commenced in 1995-96. The petitioner- Company purchased Naptha and natural gas for the purpose of generating electricity for use in the HRC plant (unit No.2). The said inputs were converted into equivalent units of electricity at the power plant of Essar Power Ltd. situated next to the factory of the petitioner and such units of electricity were used for manufacturing HRC. The petitioner availed of exemption from payment of purchase tax on the aforesaid purchase of raw materials by submitting the prescribed forms. The petitioner also availed of Modvat/Cenvat credit on the excise duty paid on Naptha and natural gas which was considered to be input used in the manufacture of the final product for excise purposes also. The petitioner disclosed in the sales-tax returns that HBI manufactured in unit No.1 was transferred to unit No.2 by way of unit transfer for using the HBI in manufacturing HRC in unit No.2.

3.5 On 14.11.2000, the State Government issued the notification amending Entry 255 and incorporating a condition that the raw materials must be used in the factory of production for manufacturing goods for sale within the State of Gujarat.

3.6 On 24.7.2001, the officers of the Sales-tax

Department checked both the manufacturing units of the petitioner – Company and on the basis of the said checking issued notices mainly raising the following objections:-

(i) Under Entry 118 exemption from payment of purchase tax on the purchase of raw materials for unit No.1 was granted on the condition that the product manufactured with such raw materials was to be sold within the State of Gujarat. Unit No.1 used raw materials without paying purchase tax and did not sell its finished product (HBI) within the State of Gujarat, but transferred the same to unit No.2 of the petitioner – Company and, therefore, there was a breach of condition.

(ii) Naptha and natural gas purchased by unit No.2 without payment of purchase tax were not used by unit No.2 but were tansferred to Essar Power Ltd., another Company, which generated electricity, and supply of electricity by Essar Power Ltd. to unit No.2 of the petitioner – Company for the purpose of manufacturing HRC was not sufficient compliance with the condition requiring unit No.2 to use Naptha and natural gas for the purpose of manufacturing HRC.

3.7 On 26.11.2001, the petitioner – Company made detailed submissions and representations to the Commissioner of Sales-tax in respect to the queries raised and contended that the raw materials were purchased by the petitioner – Company for manufacturing HBI in unit No.1 and such HBI was transferred to unit No.2 for manufacturing HRC within the State of Gujarat and that such finished product HRC manufactured in unit No.2 was sold by the petitioner -Company within the State of Gujarat and that unit Nos.1 and 2 were parts of the same legal entity being the petitioner – Company and that, therefore, there was no breach of Entry 118.

As regards the use of Naptha and natural gas purchased by the petitioner – Company for the benefit of unit No.2, it was stated that Naptha and natural gas were used for getting electricity generated by Essar Power Ltd. and that use of such electricity by unit No.2 was an integral part of the process of manufacturing HRC in unit No.2; that the benefit of exemption was availed of only for that part of Naptha and natural gas which was used by Essar Power Ltd. for supplying electricity to the petitioner – Company and that no exemption was claimed on the Naptha and natural gas used by Essar Power Ltd. for generating electricity for GEB which was one of the conditions permitting Essar Power Ltd. to generate electricity through captive power plant for the petitioner-

Company.

3.8 On 13.6.2002, the Sales-tax Officer, Surat issued notice under Section 50 of the Act demanding Rs.71.48 crores on the ground that exemption was wrongly availed of by unit No.1 which transferred HBI to unit No.2 instead of selling the same. Similarly, the Sales-tax Officer, Surat demanded Rs.199.73 crores on the ground that unit No.2 had wrongly availed of exemption on purchase of Naptha and natural gas used for generating electricity outside the factory of production. Both these demands pertain to the years 1996-97 to 2000-01.

3.9 On 16.8.2002, the Commissioner of Sales-tax, who got initiated the inquiry after the aforesaid visit/ checking of the Sales-tax Officer on 24.7.2001, communicated to the Sales Tax Officer that the petitioner had not committed any breach of the conditions of exemption by undertaking inter-unit transfer of HBI (from unit No.1 to unit No.2) or by getting the raw materials (Naptha and natural gas) converted into electricity outside its factory of production before bringing it back in the form of equivalent units of electricity for use in the manufacture of the final product.

3.10 On 31.3.2003, the Sales-tax Officer, Surat, who had issued the aforesaid notice dated 13.6.2002

under Section 50 of the Act, completed the assessment proceedings in respect of unit No.2 for assessment year 1998-99 without raising any demand in respect of the purported breach. The same officer also passed assessment order for the same year for unit No.1. Similar assessment orders were passed for unit Nos.1 and 2 for assessment years 1999-2000.

3.11 On 31.3.2005, the Sales-tax Officer, Surat passed assessment order in respect of unit No.2 for the year 2000-01 and after referring to the aforesaid communication/order dated 16.8.2002 of the Sales-tax Commissioner dropped the demand raised in the earlier notice dated 13.6.2002. Similar orders were passed in respect of unit No.1 for assessment years 1995-96, 1996-97, 1997-98 and 2000-01. On 27.2.2005, similar assessment orders were passed in respect of unit No.2 for assessment years 1995-96, 1996-97 and 1997-98.

3.12 In the meantime, however, the following demand notices came to be issued by Dy. Commissioner of Sales-tax (Corporate Cell-II), Ahmedabad -

(i) **4.2.2005** : calling upon unit No.1 to pay an amount of Rs.91.55 crores for the period 1995-96 to 2004-05 (second quarter) on account of breach of the condition of exemption due to transfer of HBI being sold

by unit No.1. (The petitioner submitted its reply dated 23.2.2005 as per the previous stand and relying on the order dated 16.8.2002 of the Sales-tax Commissioner).

(ii) **30.5.2005** : The Dy. Commissioner of Sales-tax (Corporate Cell-II), Ahmedabad issued notice to unit No.2 under Section 50 of the Act demanding an amount of Rs.480.99 crores as the amount of exemption wrongly availed of by the petitioner in respect of purchases of Naptha and natural gas for the period from 1996-97 to 2004-05.

(iii) **1.6.2005** : calling upon the petitioner – Company to show cause why interest at the statutory rate and penalty at the rate of 150% of the sales-tax / purchase tax should not be recovered from the petitioner for the period from 1995-96 to 2004-05.

(iv) **12.7.2005** : The Sales-tax Commissioner issued notices for revision under Section 67 of the Act to unit No.2 seeking to revise assessment orders for assessment years 1995-96, 1996-97, 1997-97 and 2000-01 on the ground that the petitioner had wrongly availed of the exemption by converting Naptha and natural gas into electricity

outside the factory of production. Similar notices for the same years were also issued to unit No.1 for revision of assessment orders.

4. The petitioners filed the present petitions on 14.7.2005 challenging the notice dated 4.2.2005 in respect of unit No.1 and notice dated 30.5.2005 in respect of unit No.2 as being wholly without jurisdiction and without authority of law. The petitioners also submitted written submissions to the Dy. Commissioner of Sales-tax stating that the same were being submitted without prejudice to the contentions raised in the petitions filed before this Court. The petitioner requested for a decision on jurisdiction and limitation as preliminary issues and also for personal hearing.

On 15.7.2005, the Commissioner of Sales-tax cancelled decision dated 16.8.2002 as illegal and void-ab-initio i.e. with retrospective effect. On 16.7.2005, the Dy. Commissioner of Sales-tax (Corporate Cell-II), Ahmedabad passed separate orders in respect of unit No.1 and unit No.2 confirming demand of sales-tax and levying penalty of 150% for the years 1998-99, 1999-2000 and for the years 2001-02 to 2004-05.

In reply to the notices dated 12.7.2005

issued by the Commissioner of Sales-tax for revision of the assessment orders already passed for the years 1995-96 to 1997-98 and 2000-01, the petitioner submitted reply dated 18.7.2005 submitting that the petitioner had challenged the orders passed by the Dy. Commissioner taking the similar view and that the petitions were pending before this Court.

On 19.7.2005, the Commissioner of Sales-tax issued notices for penalty against unit Nos.1 and 2 in the revision proceedings. On 20.7.2005, the petitioner again reiterated its request for keeping the proceedings pending till determination of the issues raised in the writ petition. On 21.7.2005, the petitioner also filed two Special Civil Applications before this Court challenging the notices dated 12.7.2005 and 19.7.2005 issued by the Sales-tax Commissioner and referred to hereinabove. On 22.7.2005, the Sales-tax Commissioner passed orders under Section 67 of the Act revising the assessment orders for the years 1995-96 to 1997-98 and 2000-01 and imposing penalty at the rate of 150%.

5. The amounts of tax levied, interest demanded and penalty imposed on the petitioner – Company for unit Nos.1 and 2 are set out in the charts produced by the Revenue at the hearing. The charts are also to be treated as Annexures I and II to this judgment, for unit Nos. 1 and 2 respectively.

SUBMISSIONS OF THE COMPANY ON MERITS OF LEVY OF TAX ON UNIT I.

6.1 As far as unit No.1 is concerned, Mr KS Nanavati, learned counsel for the petitioner Company has submitted that it was the Essar Steel Limited which was granted the benefit of exemption under the Pioneer Status Incentive Scheme as per the eligibility certificate dated 16.7.1991. The question of earmarking the said benefits to unit No.1 or unit No.2 did not arise because when the Company was granted the benefit of Pioneer Status, only one unit was in existence. The scheme intended to confer on the Company the benefit of exemption from payment of purchase tax on raw materials purchased for manufacturing whatever product the unit ultimately manufactured and sold within the State of Gujarat and the Company was accordingly manufacturing HBI from the raw materials purchased without payment of tax and the Company was also selling the HBI within the State of Gujarat. However, when the Company set up its additional plant or unit No. 2, the HBI manufactured in unit No.1 was being sent to unit No.2 as raw material for manufacturing HRC and HRC was admittedly being sold within the State of Gujarat.

6.2 It is vehemently submitted by Mr Nanavati that the Company is a legal entity and merely because for the convenience of manufacturing purposes, there are two units and HBI manufactured in one unit is sent to the other unit as raw material for

manufacturing HRC, it cannot be considered as sale, but it has to be considered as unit transfer and in any case since the Company sold HRC within the State of Gujarat, the conditions of exemption in Entry 118 were satisfied.

6.3 There was no breach of any of the provisions of Entry 118 of which the petitioner been claiming and getting the benefit without any demur from the revenue. In fact, pursuant to the search carried on 24.7.2001, a show cause notice under Section 50 of the Act came to be issued on 13.6.2002. In response to the said notice, the petitioner had already given its detailed replies to the Commissioner on 26.11.2001 and on other dates and it was in view of the said replies that the department was satisfied and the Commissioner of Sales-tax communicated his decision dated 16.8.2002 in favour of the petitioner on the basis of which the Assessing Officer passed assessment orders on 31.3.2005 for the assessment years 1995-96, 1996-97, 1997-98 and 2000-01 and although there is no direct reference to the said letter dated 16.8.2002, the Assessing Officer also took the same view in the assessment orders dated 31.3.2003 and 31.3.2004 for the assessment years 1998-99 and 1999-2000.

6.4 As far as unit No. 1 is concerned, it is vehemently submitted that the so-called notice dated 4.2.2005 is not merely a notice under Section 50 of the Act, but straightaway the demand calling upon the

petitioner Company to pay the amounts of tax and penalty demanded therein without giving the petitioner any opportunity of being heard. The notice dated 4.2.2005 is also without jurisdiction as the Commissioner had already exercised the powers under Section 50 of the Act while passing the order dated 16.8.2002 and the Assessing Officer or the authority issuing notice was bound by the said decision. Even otherwise, the notice is time barred since the department was aware of the procedure followed by the petitioner since 1995-96. Once the notice issued on the basis of the purported breach detected on 24.7.2001 was not pursued, issuance of subsequent notice on 4.2.2005 must also be construed as vitiated by unreasonable delay.

OTHER CONTENTIONS FOR UNIT No.1 AND UNIT No.2

7.1 The order dated 16.8.2002 in favour of the petitioner which was relied upon by the Assessing Officer as recently as on 31.3.2005 for unit No. 1 and as recently as on 27.5.2005 for unit No. 2 could not have been cancelled or withdrawn without giving the petitioner a show cause notice and a reasonable opportunity of being heard.

7.2 It is also submitted that the proceedings under Section 50 cannot be initiated unless reassessing or revisional authority had reasons to believe that any turnover of sales or turnover of purchase of any goods chargeable to tax under the Act

had escaped assessment or has been under-assessed or assessed at the lower rate. Strong reliance is placed on the decision of the Apex Court in Calcutta Discount, (1961) 41 ITR 191 in support of the contention that where the notice is issued by the authority without any objective material for arriving at such satisfaction, the Court would issue a writ of prohibition under Article 226 of the Constitution.

7.3 As regards assessment years 1995-96, 1996-97 and 1997-98, it is submitted that the notices were issued by the Commissioner under Section 67 of the Act on 12.7.2005 and within a period of ten days, not only the final revisional orders were passed, but when the petitioner raised objections on 12.7.2005, the Commissioner issued notices for penalty on 19.7.2005 and passed the orders of penalty on 22.7.2005 i.e. within a period of just three days. It is, therefore, submitted that the orders of penalty are passed in terrorem.

7.4 It is also submitted that once the assessment orders were passed for the years 1998-99 and 1999-2000, no separate orders could have been passed under Section 50 of the Act on 16.7.2005.

As regards the orders dated 16.7.2005 passed under Section 50 of the Act by the Deputy Commissioner, Corporate Cell for the years 1998-99 and 1999-2000, it is submitted that the jurisdictional Assessing Officer was the Sales-tax

Commissioner and, therefore, the Deputy Sales-tax Commissioner, Corporate Cell had no jurisdiction to pass the orders under Section 50 of the Act.

7.5 As far as the assessment years 2001-02, 2002-03, 2003-04 and 2004-05 are concerned, it is submitted that the orders passed on 16.7.2005 were also without jurisdiction as they were passed pursuant to the notices issued on 4.2.2005 for unit No. 1 and 30.5.2003 for unit No. 2 whereas the delegation in favour of the Deputy Commissioner, Corporate Cell came to be made on 14.6.2005 and that too only for the years 1995-96 to 2000-01. It is, therefore, submitted that the said delegation could not have breathed life into still born show cause notices dated 4.2.2005 and 30.5.2005.

7.6 In any case, there could not have been any notice under Section 50 of the Act for the AY 2001-02 onwards because even as per the department's case the so-called breach was allegedly detected on 24.7.2001 and, therefore, atleast after 24.7.2001 there could not have been any question of invocation of Section 50.

CONTENTIONS AGAINST ORDER OF PENALTY

8. As regards the orders of penalty, it is submitted that as per the settled legal position, particularly the principles enunciated in the case of

Hindustan Steel Ltd. vs. State of Orissa, AIR 1970 SC 253, the department could not have imposed penalty assuming that the tax liability was involved, merely because it is lawful to do. As held by the Hon'ble Supreme Court, the penalty could not be imposed unless elements of culpability are involved. Apart from the fact that the decision dated 16.8.2002 of the Commissioner was in favour of the petitioner Company, the petitioner has never carried out any clandestine activity. All the material regarding purchase of raw materials, finished products, separate turn over of both the units and all other details were always furnished and the department has also not been able to show that the petitioner has done anything clandestinely to evade payment of sales-tax or to avail of the benefits of the two incentive schemes.

CONTENTIONS ON MERITS REGARDING UNIT No.2

9. As far as unit No.2 is concerned, on merits of the matter, it is submitted that the purchase of Naphtha and natural gas for generation of electricity was in order to ensure that the electricity is made available for heating the raw material for the purpose of manufacturing HRC. Strong reliance is placed on the decisions in case of Tata Oil Mills Co. Ltd. vs. Collector of Central Excise, (1989) SCC 541, Indian Farmers Fertilizer Co-op. Ltd. vs. Collector of Central Excise, Ahmedabad, (1996) 5 SCC 488 and Unichem Laboratories Ltd. vs. Collector of Central Excise, (2002) 7 SCC 145 in support of the

proposition that electricity can be an important raw material for a plant like this where electricity is not merely used as captive power, but also as an integral part of the manufacturing process. Reliance is also placed on the decision in Telco case in support of the contention that if an ingredient or raw material necessary for the purpose of manufacturing off site is purchased, that does not mean that the assessee will lose the benefit of exemption which would otherwise be admittedly available if the process is done within the factory premises of the concerned unit to which the exemption benefit is granted.

10. Objections regarding lack of jurisdiction, time bar, unreasonable delay in issuance of notice and undue haste in passing the impugned orders and also regarding penalty raised for unit No.1, were also raised for unit No.2.

SUBMISSIONS ON BEHALF OF REVENUE

11. In reply, Mr Kamal B Trivedi, learned Advocate General has submitted that the petitioner has already availed of alternative remedy of filing appeals before the Joint Commissioner of Sales-tax against the orders under Section 50 of the Act and against the revisional orders of the Commissioner under Section 67 of the Act. The petitioner has already filed revisions before the Tribunal. The petitioner having already availed of these

alternative remedies, it is for the petitioner to pursue those remedies and to file applications for stay before those adjudicating authorities.

12. Without prejudice to the above submission, it is further submitted that the power under Section 50 is independently available to the authority irrespective of exercise of powers under Section 41 for assessment or reassessment under Section 44 since the exemption is granted under notifications under Section 49 subject to certain conditions. Section 50 concisely and deliberately confers powers on the authority to ensure that in case any breach of any condition is detected, the sales or purchases escaping payment of tax can be subjected to sales tax or purchase tax, as the case may be, and that is all that the Deputy Commissioner, Corporate Cell has done by passing orders dated 16.7.2005 under Section 50 and by the Commissioner by passing orders dated 22.7.2005 in revisions. It is submitted that the question whether there is breach of any particular condition of exemption will involve factual inquiry and, therefore, this Court will not entertain these petitions.

13. As regards the question of jurisdiction, reliance is placed on the circular dated 6.10.2004 setting up the Corporate Cell and specifically mentioning therein that the jurisdiction to make assessments for the years 2001-02 onwards will be with the Deputy Commissioner of Sales-tax, Corporate

Cell itself as a specified officer is designated for each individual assessee in the Corporate sector.

As regards the years 1995-96 to 2000-01, reliance is placed on the delegation order dated 14.6.2005 specifically transferring the cases to the Deputy Commissioner of Sales-tax, Corporate Cell.

14. On the question of alleged violation of principles of natural justice, it is submitted that the notices were issued on 4.2.2005 for unit No. 1 and 30.5.2005 for unit No. 2 giving detailed reasons for invoking the power under Section 50 and sufficient time and opportunity was given to the petitioner to meet with the same.

15. As regards the notices issued by the Commissioner under Section 67 of the Act, it is submitted that such notices were issued on 12.7.2005 and the orders were passed on 22.7.2005. It is submitted that since the breach of conditions was detected on 24.7.2001, the revenue could not have taken the risk of getting the assessment orders or other orders time barred in view of the time limit of four years (three years + one year as stipulated in Section 50 of the Act). The notice dated 4.2.2005 is required to be read with the communication dated 1.6.2005.

16. On merits of the matter, it is submitted that the eligibility certificate for the incentive

scheme and the benefits of the incentive scheme are granted to each individual unit and not to the Company as a whole. Unit No. 1 was set up during the period when the Pioneer Scheme was available and unit No. 2 was given the benefit of the prestigious unit. Both are separate schemes having water-tight compartments and, therefore, the product manufactured by unit No. 1 with the raw materials purchased without payment of purchase tax on account of the incentive for the Pioneer Unit were required to be sold by unit No. 1 in order to fulfill the conditions of Entry 118. Since such finished products manufactured by unit No. 1 were not sold within the State of Gujarat, but they were sent to unit No. 2 for being used as raw materials for manufacturing HRC, this fact is sufficient to disentitle the Company from claiming any incentive under the scheme for the Pioneer unit. The rationale of imposing the condition as stipulated in Entry 118 was to see that whatever sales-tax leviable on sale of the finished products of unit No. 1 would be liable to be adjusted against the incentive amount specified for the Pioneer unit - appox. Of Rs.237 crores and that if the sale of HRC made by unit No. 2 is treated as sufficient compliance with the conditions stipulated in Entry 118, it would mean that the intermediate product manufactured by unit No. 1 is granted the benefit of incentive given only to unit No. 2.

17. As far as unit No.2 is concerned, it is submitted that the Prestigious unit scheme

specifically excludes electricity generation as one of the industries excluded from the benefit of incentives for the Prestigious units. Hence, Naphtha and gas purchased by unit No. 2 without payment of purchase tax and transferred to Essar Power Limited, which is a separate legal entity, cannot be permitted to qualify for exemption available to unit No. 2 merely because the electricity generated by Essar Power Limited is supplied to unit No. 2 as fuel for manufacturing activities of unit No. 2.

It is submitted that the condition in Entry 255 even before the amendment made on 14.1.2000 specifically required the unit to use the purchased goods as raw materials. Unit No.2 having purchased Naphtha and gas had not used those raw materials for its manufacturing activities i.e. for manufacturing HRC. The doubt, if any, was subsequently removed by the amendment made on 14.11.2000 which specifically provided that the raw materials shall be used by the eligible unit to manufacture all its products.

18. As regards the order dated 16.8.2002, the learned Advocate General submitted that it was merely a communication between two officers of the department. Apart from the fact that it was never communicated to the petitioner, it was neither an order under Section 41 nor an order under Section 50 nor an order under Section 67 of the Act and, therefore, there was no question of issuing any notice to the petitioner before withdrawing the same.

When it was realized that under some misconception, the communication was sent on 16.8.2002 which permitted the petitioner to evade its tax liabilities and use the incentive schemes for which such incentives were never intended to be given, the Commissioner was justified in cancelling the communication dated 16.8.2002 as illegal and void ab initio.

Reliance placed by the Assessing Officers on the said communication in the orders dated 13.5.2005 and 27.5.2005 cannot be justified because the Assessing Officer as a quasi judicial authority was required to decide the matter independently without any dictate of any higher officer and, therefore, all that the Commissioner had specifically done was to call upon the officers to decide the matter in accordance with law and not on the basis of any such pre-concealed instructions.

19. Mr Trivedi also placed reliance on the following decisions in support of the contention that the conditions of the exemption notification are to be strictly construed :-

(i) Eagle Flask Industries Ltd. vs. Commissioner of Central Excise, Pune, (2004) 7 SCC 377.

(ii) Commissioner of Central Excise, Allahabad vs. Ginni Filaments Ltd., (2005) 3 SCC 378.

REJOINDER

20. In rejoinder, Mr Nanavati and Mr Joshi for the petitioner have also submitted that ordinarily when such appeals/revisions are moved before the appellate authority/Tribunal and stay applications are filed, the appellant authority/Tribunal grants interim stay of tax recovery upon deposit of 10% of the amounts. This statement is disputed by the learned Advocate General and submits that the stay applications are decided in the facts and circumstances of each case and there could not be any general rule applicable to all cases.

21. Reliance is also placed by the learned counsel for the parties on several decisions rendered in the context of the Central Excise Act and the Customs Act requiring pre-deposit of tax and other amounts at the time of filing the appeals before the appellate authorities.

DISCUSSION

22. Ordinarily, when the disputes are subject matter of appeals/revisions, this Court would not entertain the petitions but for the following reasons, the Court has gone into the arguments advanced by the learned counsel on either side for the limited purpose of considering the question of pre-deposit :-

(i) This Court's order dated 6.10.2005 permitted the petitioner Company to file applications for exemption from predeposit before this Court.

(ii) Earlier the Commissioner of Sales-tax had already taken the view on 16.8.2002 in favour of the petitioner Company in respect of both the controversies and thereafter on 15.7.2005 the Commissioner of Sales-tax cancelled the communication dated 16.8.2002 as illegal and void ab initio with retrospective effect.

(iii) The petitioner Company has raised several preliminary contentions - absence of reasons for reassessment, time bar or unreasonable delay in issuance of notice for reassessment. The decision of the Apex Court in the case of Calcutta Discount Co. Ltd. vs. ITO, (1961) 41 ITR 191 laying down the following principle will, therefore, be required to be borne in mind while considering whether the question of predeposit should be considered by this Court :-

> "That though the writ of prohibition or certiorari would not issue against an executive authority, the High Courts had power to issue in a fit case an order prohibiting an executive authority from acting without

> jurisdiction. Where such action of an executive authority, acting without jurisdiction subjected, or was likely to subject, a person to lengthy proceedings and unnecessary harassment, the High Courts would issue appropriate orders or directions to prevent such consequences. The existence of such alternative remedies as appeals and reference to the High Court was not, however, always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action. When the Constitution conferred on the High Courts the power to give relief it becomes the duty of the Courts to give such relief in fit cases and the Courts would be failing to perform their duty if relief were refused without adequate reasons."

Even if this Court were not to pass any orders at this stage and relegate the petitioner to the revisional/appellate forum for rendering decision on the question of pre-deposit and conditional stay, any such decision to be rendered by the revisional/appellate authority is bound to come back to this Court at the instance of either the assessee or the revenue or both. When the petitions were heard at length, this Court is of the view that considerable time invested now need not be wasted only to allow the parties to come back in the second ground with the same contentions and prayers.

(iv) The petitioner Company is shown to have just recovered from sickness and is undergoing restructuring under the supervision of secured creditors. If the demands made by the revenue are permitted to be enforced at one go, the Company would find it impossible to survive and creating any such situation would be counter productive for the State exchequer itself as the Company is about to reach the exemption limits for Unit No. 2 and is going to start paying sales-tax/purchase tax within a few months. The Court is informed that the Company would now start paying such taxes to the tune of Rs.150 to Rs.200 crores per year. It would, therefore, be in the interest of the State exchequer itself to see that the petitioner Company is not pushed so hard to the wall that the State exchequer itself kills the goose that is going to start laying golden eggs.

(v) The disputes in these petitions and the pending appeals/revisions pertain to the Company availing tax exemption within the tax incentive scheme amounts of Rs.237 Crores for Unit No. 1 and Rs.2050 Crores for Unit No.2 on the basis of the investments made by the Company to the tune of three times the aforesaid exemption limits.

While considering the question of pre-deposit in such cases, the matter need not be examined with the same harsh attitude which the revenue has adopted in this case for the period dating back to assessment years 1995-96 onwards.

(vi) The Court also proposes to direct the revisional/appellate authority to decide the revisions/appeals by 30th June, 2007.

23. As far as unit No. 1 is concerned, the only dispute is whether despite the uncontroverted facts that unit No.1 manufactured HBI with the raw materials purchased tax free and thereafter the HBI so manufactured was transferred to unit No.2 and unit No.2 manufactured HRC with such HBI and the petitioner Company having and running both these Units sold the HRC within State of Gujarat - the petitioner can be said to have committed breach of the conditions stipulated in Entry 118. In other words, can it be said that product manufactured with the tax free purchase of raw materials HBI was not sold within the State of Gujarat in any form ?

24 Entry 118 reads as under :-

(2) Sales of raw materials, consumable stores, or packing matrials by a registered dealer to a specified manufactures.	Whole of tax	(1) & (2) .... (3) If the specified manufacture has actually used the goods within the State of Gujarat as raw materials, processing materials or consumable stores <u>in the manufacture of any goods for sale by him which shall not take place outside the State of Gujarat</u> or as packing materials in the packing of the goods so manufactured. (4) If the specified manufacturer furnishes to the selling dealer a certificate in **Form 1** appended hereto declaring **inter alia** that the goods are required for use by him within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale which shall not take place outside the State of Gujarat or as packing materials in the packing of the goods so manufactured. (emphasis supplied)

25.1 Admittedly both the units belong to the

petitioner Company. The petitioner is a single legal entity. HBI made in unit No. 1 with tax free raw materials was not sold outside Gujarat but after value addition thereto in unit No. 2, the final product HRC was sold in the State of Gujarat. On 16.8.2002 the Commissioner of Sales-tax took the view that such transfer of HRC from unit No. 1 to unit No. 2 did not result into violation of the conditions in Entry 118. This view was followed in assessments made till March, 2005.

25.2 Assuming against the petitioner Company, if a different view had been taken by the authorities at any earlier point of time, the petitioner Company could have taken care of the objections by raising invoices for selling two components of the same HRC :-

(i) invoice to be raised by unit No.1 for HBI
(ii) invoice to be raised by unit No.2 for value addition to HBI for making HRC.

25.3 If at all the transfer of HBI from unit No. 1 to unit No. 2 was not permissible as contended by the revenue and if such an objection was decided against the petitioner earlier, apart from the fact that the Company itself could have made arrangements for showing sale of finished products in two parts – the HBI manufactured by unit No. 1 and the remaining part of the finished product being HRC made by unit No. 2, the department itself could have adjusted the

HBI component of the price against the sales-tax incentive available to unit No.1.

25.4 We are, therefore, of the view that the petitioner Company has not only made out a strong case for waiver of penalty and interest, but has also made out a strong case for exemption from deposit of tax amount till disposal of the appeals/revisions filed by the petitioner Company in respect of unit No. 1.

26. Coming to Unit No. 2 manufacturing HRC with electricity generated by Essar Power Limited from raw materials Naptha and natural gas purchased by the petitioner Company, Entry 255 is required to be considered with amendment to the conditions in Entry 255, particularly the amendment made by Government notification No. 49(322) dated 14.11.2000.

Entry 255 before amendment read as under :-

255(1) ....

(2)Sales of raw materials, processing materials,consumable stores or packing materials by a registered dealer, to an eligible unit.	To the extent to which the amount of Sales Tax exceeds **one fourth** of one percent and to the extent to which the amount of general Sales Tax exceeds **one fourth** of one percent : **Provided** that if on the same goods sales tax is leviable no general sales tax be levied.	(1) If the eligible unit furnishes to the selling dealer a certificate in **form 26** appended hereto, obtain from the registering authority, declaring inter-alia that the goods are required for use by him within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat or as packing materials in the packing of the goods so manufactured.

Entry 255 after the amendment amendment

reads as under :-

(1)		
(2)Sales of raw materials, processing materials,consumable stores or packing materials by a registered dealer, to an eligible unit.	To the extent to which the amount of Sales Tax exceeds **one fourth** of one percent and to the extent to which the amount of general Sales Tax exceeds **one fourth** of one percent : **Provided** that if on the same goods sales tax is leviable no general sales tax be levied.	[1][(1) If the eligible unit furnishes to the selling dealer a certificate in **form 26** appended hereto and obtained from the registering authority, declaring inter-alia that the goods shall be used by it as raw materials, processing materials or consumable stores, in its industrial unit for which it has obtained the eligibility certificate, in the manufacture of goods, for sale within the State of Gujarat or outside the State of Gujarat or as packing materials in the packing of goods so manufactured [2][or]

[3][(1a) If the eligible unit furnish to the selling dealer a certificate in **form 26** appended hereto and obtained from the registered authority, declaring inter-alia that the goods shall be used by it as raw materials, processing materials or consumable stores, in its industrial unit for which it has obtained the eligibility certificate, in the manufacture of goods for dispatch to its another unit or division situated within the State for use in the manufacture of other goods for sale by such another unit or division or to its another unit or division situated outside the State for use in the manufacture of other goods.]

(2) if the eligible unit fulfills the conditions specified hereunder and further conditions as may be laid down from time to time.

(emphasis supplied)

[1] Condition (1) in sub-entry(2) substituted by S.49 (332) dt.14.11.2000.

[2] The word “or” is inserted by GNFC (GHN-2)/GST-2002-S.49(357) TH dt.16.1.2002.

[3] Condition (1a) inserted by GNFC 49(357) dt.16.1.2002

27. Having regard to the fact that electricity generation is one of the excluded items as far as the benefits under the Prestigious Unit Scheme is concerned and that Essar Power Limited is a separate legal entity generating electricity and considering the fact that Naphtha and natural gas purchased by the petitioner Company is supplied to Essar Power Limited and thereafter it is Essar Power Limited which uses the said raw material for generating electricity which is then supplied by Essar Power Limited to the petitioner Company under a separate power purchase agreement and also having regard to the fact that the conditions in Entry 255 underwent a substantial amendment on 14.11.2000 and having regard to the authorities cited at the bar and preliminary

contentions raised, the matter requires detailed scrutiny in revision/appeals. Hence, we are inclined to direct the petitioner Company to make pre-deposit of 50% of only the tax amount without making pre-deposit of any interest or penalty, in so far as unit No.2 is concerned.

DIRECTIONS

A. It is directed that till final hearing and disposal of the appeals/revisions filed by the petitioner Company, the respondents authorities shall not make any recovery of any tax, interest or penalty in respect of unit No. 1 of the petitioner Company for the period from 1995-96 till 2004-05 on the ground that HBI manufactured by the petitioner Company in its unit No. 1 at Hazira with the tax free purchase of raw materials was transferred to unit No.2 of the petitioner Company for the purpose of manufacturing HRC, if ultimately the final product was sold within the State of Gujarat.

B. As far as the liabilities of the petitioner Company in respect of unit No.2 are concerned, till the hearing and final disposal of the appeals/revisions filed by the petitioner Company, the respondent authorities shall not implement or enforce the impugned orders of levying tax, interest and penalty, subject to the condition that the petitioner Company

deposits 50% of only the tax amount levied in respect of unit No.2 within the time limits stipulated in this order (i.e. 50% of Rs.423 crores as indicated in Annexure II to this order). Such amount i.e. 50% of the tax amount for the period from 1995-96 to 2004-05 shall be first reduced by Rs.75 crores already deposited and the balance amount shall be deposited in twelve equal monthly installments. The first such installments shall commence from 31st May 2006 and last such installment shall be deposited by 30th April, 2007.

C. These interim directions shall operate during pendency of the appeals/revisions before the appellate authority/tribunal subject to the condition that on behalf of the petitioner Company an undertaking shall be filed by 31st May 2006 that -

(i) The petitioner Company shall co-operate for expeditious disposal of the appeals/revisions,

(ii) In case the petitioner Company finally loses in the proceedings right upto the Hon'ble Supreme Court, the petitioner Company will pay the amounts as may be determined.

D. (i) The deposits to be made pursuant to this

order shall be without prejudice to the rights and contentions of the parties and shall enure till the final disposal of the appeals/revisions before the appellate authority/Tribunal and in order to ensure that there are no multiplicity of proceedings, the Tribunal shall decide the revisions as expeditiously as possible and preferably by 30th June, 2007. The deposits shall, therefore, enure for stay of operation, implementation and execution of the impugned orders till all the proceedings are decided by the Tribunal.

(ii) Since the orders impugned in these proceedings came to passed during pendency of the petitions, i.e. atleast after filing of Special Civil Application No. 14422 and 14424 of 2005, and also considering the fact that it is the revenue which had raised objection against maintainability of the petitions on the ground of availability of alternative remedy of appeals/revisions, we direct that the appeals/revisions already filed in the month of October, 2005 shall be decided by the appellate authority/Tribunal on merits after duly considering the applications, if any, made for condonation of delay.

(iii) At the request of Mr Nanavati and Mr Joshi for the petitioner, it is clarified that it will be open to the petitioner to request the

Joint Commissioner of Sales-tax, the appellate authority, to stay the hearing of the appeals till the Tribunal decides the revisions or to transfer the appeals themselves before the Tribunal. Such applications may be considered in accordance with law.

E. It is clarified that the revisional/appellate authority is at liberty to decide the matters in accordance with law without being influenced by any observations made in this order or the directions regarding pre-deposit. The observations have been made for the limited purpose of considering the request for pre-deposit and the directions regarding pre-deposit have also been made having regard to the questions of prima facie case and financial hardship. This Court may not be treated to have expressed any final opinion on any of the controversies between the parties either regarding the merits of the disputes or the preliminary contentions sought to be raised by the petitioner Company.

28. The petitions as well as the Civil Applications are disposed of in terms of the aforesaid directions.

[M.S. SHAH, J.]

[SHARAD D. DAVE, J.]

sundar/-